Supreme Court, U. S.
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in the

Supreme Court

of the

United States

NO. 77-1739

OCTOBER TERM, 1977

PAUL MARK RYAN,
ARTHUR T. MCMANMON, JAMES M. CONNOLLY
Trustees of the EDWARD C. DONNELLY, JR.
REVOCABLE TRUST,

Petitioners,

v.

MARY ELIZABETH DONNELLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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June 1978

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in the

Supreme Court

of the

United States

October Term, 1977

NO.

PAUL MARK RYAN,
ARTHUR T. MCMANMON, JAMES M. CONNOLLY
Trustees of the EDWARD C. DONNELLY, JR.
REVOCABLE TRUST

Petitioners,

v.

MARY ELIZABETH DONNELLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Third District, entered in the proceedings on May 24, 1977.

OPINIONS BELOW

The opinion of the Third District Court of Appeal, a per curiam affirmance, is reported at 348 So.2d 970 and is reproduced in Appendix A to this petition. The opinion of the Supreme Court of Florida finding that it is without jurisdiction to review the decision of the Third District Court of Appeal is reported at 357 So.2d 187 and is reproduced in Appendix B to this petition. The order of the Circuit Court for Dade County, which denied petitioners' motion to quash service of process and which was reviewed by the Third District Court of Appeal, is not reported but is reproduced in Appendix C to this petition.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was entered on May 24, 1977, and became final on June 29, 1977, when the petition for rehearing was denied. See Appendix A. A petition to the Supreme Court of Florida for a writ of certiorari was denied on January 9, 1978, and a petition for rehearing directed to the Supreme Court of Florida was denied on March 10, 1978. See Appendix B. This petition for certiorari was filed within the time limit of 90 days. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

The Third District Court of Appeal of Florida affirmed an order of the Circuit Court of Dade County holding that Florida courts have personal jurisdiction over the non-resident petitioners in this case on the sole ground that they are "doing business" in the state. The order of the circuit court shows on its face, however, that all of the activities of the petitioners allegedly constituting the doing of business in Florida occurred after the respondent's cause of action arose.

The question is whether the "minimum contacts" or "fair forum" requirement of Section 1 of the Fourteenth Amendment to the Constitution of the United States limits a state court's long-arm jurisdiction over non-resident individuals to those causes of action that arise directly out of the individuals' activity in the state.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case originated upon the respondent's filing of a complaint in Dade County, Florida, to obtain a dower interest in certain assets held in trust in Massachusetts by the petitioners, all of whom reside in and are residents of Massachusetts. The complaint alleged that the assets held by the petitioners were owned by the respondent's husband at the time of his death in Florida or, alternatively, that the trust is illusory, testamentary, and, therefore, void.

The respondent served process upon the non-resident petitioners by serving the Florida Secretary of State under the color of authority of Florida's "doing business" long-arm statute and by serving two of the co-executors of the estate of the respondent's decedent as agents of the petitioners.

The petitioners filed a "Motion To Dismiss And Motion To Quash Purported Service Of Process" based on the ground, among others, that the Dade County Circuit Court lacked jurisdiction over the persons of the petitioners. Appendix D (1). The motion expressly stated that the attempted service of process was totally insufficient to provide in personam or in rem jurisdiction of the circuit court over the petitioners or the trust res and that the exercise of jurisdiction by Florida courts over the petitioners would violate Section 1 of the Fourteenth Amendment to the Constitution of the United States. Appendix D (1).

In support of the motion to quash service of process the petitioners filed a memorandum of law specifically arguing that the jurisdictional issue in the case is con-

trolled by *Hanson v. Denckla*, 357 U.S. 235 (1958). Appendix D (2). (It should be noted that the motion was filed before the Court's more recent decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977).) One of the points made by the petitioners in the argument was that this Court had distinguished *Denckla* from *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957), on the basis that the cause of action in *Denckla* did not arise out of an act or transaction consummated in the forum state, the same factual situation that exists in the present case. Appendix D (2).

The Circuit Court for Dade County rejected the petitioners' argument by denying their motion. In a lengthy order the circuit court set forth all of the acts that it considered as evidence of the petitioners doing business in Florida and held that it had personal jurisdiction over the petitioners. Appendix C. All of these acts allegedly constituting the doing of business in Florida, however, occurred after the death of the respondent's decedent, which was the moment at which the respondent's claim for dower arose. That is, the respondent's cause of action could not possibly have arisen out of the petitioners' alleged activities in the state.

The petitioners appealed to the Third District Court of Appeal of Florida and argued primarily that Florida courts could not obtain personal jurisdiction over the petitioners because the respondent's cause of action arose before the petitioners were found by the trial court to be doing business in the state either directly or through agents. Appendix D (3). This again raised the due process question before Florida courts.

The Third District affirmed the order of the circuit court without opinion and the Supreme Court of Florida decided that it was without jurisdiction. The present petition for certiorari was filed within 90 days of the Florida Supreme Court's denial of a petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision below is not in accord with the due process principles enunciated by this Court in *Hanson v. Denckla* and *Shaffer v. Heitner*.

In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), this Court stated that one of the reasons Florida courts did not have in personam jurisdiction over the non-resident trustee was that "[t]he cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State." As to this point, the Court concluded that "this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida." *Id.* at 252.

In *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), this Court revisited the decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and observed that "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the State on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." (Footnote omitted.) The Court then proceeded to apply this same standard of "contacts among the forum State, the defendant, and the litigation" to an inquiry into in rem jurisdiction. *Id.* at 207, 213.

Thus *Hanson* and *Shaffer* establish that an extremely important element in determining whether due process requirements for exercising long-arm jurisdiction have been met is whether the plaintiff's cause of action arose out of the non-resident defendant's activities in the forum state. Furthermore, several United States Circuit Courts of Appeal have interpreted *Hanson*, and would, presumably, in-

terpret *Shaffer*, as *requiring* that the cause of action arise from the defendant's activities in the state. *E.g.*, *AMBA Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 789 (9th Cir. 1977); *Thompson v. Ecological Science Corporation*, 421 F.2d 467, 469 (8th Cir. 1970); *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

The decision of the Third District Court of Appeal of Florida is not in accord with these due process principles. By affirming the order of the Circuit Court for Dade County, the Third District necessarily decided that the respondent's cause of action need not have arisen out of the non-resident petitioners' activities in Florida for the state's courts to exercise personal jurisdiction over the petitioners. This follows because all of the petitioners' activities allegedly constituting the doing of business in Florida occurred after the respondent's cause of action arose.

To be more specific, the petitioners could not have been doing business in Florida through their "direction, operation, management, and control" of the business trust at the time the respondent's cause of action for dower arose, as declared by the trial judge (Appendix C, paragraphs 4-7), because, according to the respondent's own argument, none of the petitioners had any control over the business trust until after the death of Edward C. Donnelly on October 15, 1972. Prior to that point, their ownership interest was merely as trustee-stockholders, which is not sufficient to consider them as "doing business" in the state. *Uible v. Landstreet*, 392 F.2d 467 (5th Cir. 1968). The provision of the revocable trust upon which the trial judge placed reliance to proclaim that the petitioners legally had management control, not just

shareholder control, over the business trust did not, by its own terms, take effect until after the death of Mr. Donnelly (Appendix C, paragraphs 5-6). And all of the activities of the petitioners relied upon by the trial judge as a basis for establishing their actual control of the business trust took place after the death of Mr. Donnelly (Appendix C, paragraph 7).

In the same manner, the petitioners could not have been doing business in Florida through "transactions" by and for the revocable trust itself at the time the respondent's cause of action arose, as stated by the trial judge (Appendix C, paragraphs 8-9), because all of those transactions took place well after the death of Mr. Donnelly. As a result, the respondent's cause of action could not possibly have arisen from those transactions because they simply had not yet been performed at the time the respondent's cause of action arose.

Finally, the petitioners could not possibly have been doing business in Florida through an agency relationship with executors of the estate of Edward C. Donnelly, Jr. at the time the respondent's cause of action arose, as stated by the trial judge (Appendix C, paragraphs 10-13), because the executors were not appointed and did not perform any of their functions until after the death of Mr. Donnelly. Consequently, the respondent's cause of action could not have arisen out of any transaction or operation performed by the alleged agents of the petitioners because those alleged agents had not even been appointed, let alone functioning, at the time of Mr. Donnelly's death.

It is, therefore, evident that the Third district, in affirming the order of the trial judge in this case, has extended the jurisdiction of Florida courts to include a suit not

arising out of the non-resident petitioners' activities in the state.

2. This Court has not directly decided the federal question of substance raised by the decision below and the circuit courts of appeal are in conflict on the point.

Although this Court has established that an extremely important element in determining whether due process requirements for exercising long-arm jurisdiction have been met is whether the plaintiff's cause of action arose out of the non-resident defendant's activities in the forum state, it has not specifically considered whether the cause of action *must* arise out of the activities of the defendant in the state. *See Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Moreover, the circuit courts of appeal are currently in conflict on this point. *Compare Pickens v. Hess*, No. 76-2098 (6th Cir. April 10, 1978) *and Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968) *and Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977) *and Thompson v. Ecological Science Corporation*, 421 F.2d 467 (8th Cir. 1970) *with Wilkerson v. Fortuna Corporation*, 554 F.2d 745 (5th Cir. 1977) *and Whittaker Corporation v. United Aircraft Corporation*, 482 F.2d 1079 (1st Cir. 1973). The Sixth and Ninth Circuits explicitly state, based upon this Court's opinions in *Hanson v. Denckla*, *McGee*, and *International Shoe*, that any cause of action *must* arise out of the non-resident's activities in the state to meet the due process requirement of the Fourteenth Amendment while

the Fifth Circuit just as clearly states, having argued by analogy from this Court's decision in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), that the Fourteenth Amendment does *not* require that the cause of action arise out of the defendant's activities in the state.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL J. POWERS, JR.
JAMES E. TRIBBLE
BRADFORD SWING

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Attorneys for Petitioners

Appendix

APPENDIX A (1)

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1977

CASE NO. 77-431

PAUL MARK RYAN, ARTHUR T. McMANMON, JAMES M. CONNOLLY, Trustees of the EDWARD C. DONNELLY, JR., REVOCABLE TRUST dated October 8, 1968,

Appellants,

vs.

MARY ELIZABETH DONNELLY,

Appellee.

Opinion filed May 24, 1977.

An Interlocutory Appeal from the Circuit Court of Dade County, J. Gwynn Parker, Judge.

Blackwell, Walker, Gray, Powers, Flick & Hoehl and James E. Tribble, for appellants.

Walton, Lantaff, Schroeder, Carson & Wahl and Joan S. Buckley, for appellee.

Before BARKDULL, HAVERFIELD and NATHAN, JJ.

PER CURIAM.

Affirmed.

APPENDIX A (2)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1977
WEDNESDAY, JUNE 29, 1977

CASE NO. 77-431

PAUL MARK RYAN, et al.,
Appellants,

vs.

MARY ELIZABETH DONNELLY,
Appellee.

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

Clerk, District Court of
Appeal, Third District

cc: James E. Tribble
Walton, Lantaff, etc.

/plc

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

APPENDIX B (1)

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 9, 1978

CASE NO. 52,010

DISTRICT COURT OF APPEAL,
THIRD DISTRICT

DCA CASE NO. 77-431

PAUL MARK RYAN, ET AL.,
Petitioners,

vs.

MARY ELIZABETH DONNELLY,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C. J., ADKINS, BOYD, ENGLAND and SUNDBERG, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Sara Griney
Deputy Clerk

sg
cc: Honorable Louis J. Spallone, Clerk
Honorable Richard P. Brinker, Clerk
Honorable J. Gwynn Parker, Judge
Messrs. Blackwell, Walker, Gray,
Powers Flick & Hoehl
Messrs. Walton, Lantaff, Schroeder
& Carson

APPENDIX B (2)

[TITLE OMITTED]

[FRIDAY, MARCH 10, 1978]

On consideration of the petition for rehearing filed by attorneys for petitioners,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

c
cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. J. Gwynn Parker, Judge
James E. Tribble, Esquire
of Blackwell, Walker, Gray,
Powers, Flick & Hoehl
Joan S. Buckley, Esquire
of Walton, Lantaff,
Schroeder & Carson

APPENDIX C

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 75-7007

MARY ELIZABETH DONNELLY,

Plaintiff,

vs.

PAUL MARK RYAN, ARTHUR T. MCMANMON,
JAMES M. CONNOLLY, Trustees of the
EDWARD C. DONNELLY, JR. REVOCABLE TRUST
dated October 8, 1968,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND MOTION TO QUASH

THIS CAUSE came on to be heard on Defendants' Motion To Dismiss Plaintiff's Complaint and Motion to Quash Service of Process, and the Court heard argument of counsel for Plaintiff and Defendants. Having considered same and having reviewed the pleadings, affidavits and all memoranda of law and of fact submitted by the parties, and being fully advised in the premises, the Court makes the following findings of fact:

1. Section 48.181(1), Florida Statutes, (1975), provides for service of process on, and the consequent acquisition of personal jurisdiction over, nonresidents who "operate, conduct, engage in, or carry on a business or business venture in the state, or . . . have an office or agency in the state, . . . in any action or proceeding . . . arising out of any transaction or operation connected with or incidental to the business or business venture. . .".

2. Section 48.071, Florida Statutes, (1975), provides for service of process upon agents of nonresidents who are doing business within the state; Section 48.161, Florida Statutes, (1975), provides a method of substituted service of process to be utilized for nonresidents who are doing business within this state.

3. Defendants, PAUL MARK RYAN, ARTHUR T. MCMANMON, and JAMES M. CONNOLLY, Trustees of the Edward C. Donnelly, Jr. Revocable Trust, were duly and properly served pursuant to Section 48.071, Florida Statutes (1975), by service on their agents, the Executors of the Estate of Edward C. Donnelly, Jr., through whom Defendants are doing business within the state of Florida; Defendants were also duly and properly served by substituted service of process on the Secretary of State of Florida, pursuant to Sections 48.161 and 48.181, Florida Statutes (1975), since Defendants are nonresidents who operate, conduct, engage in, or carry on a business or business venture in this state, and have an agency in this state, in regard to an action arising out of a transaction or operation connected with or incidental to the business, business venture, and/or agency in this state.

4. Defendants, Trustees of the Edward C. Donnelly, Jr. Revocable Trust, are operating, conducting, engaging in or carrying on a business or business venture in Florida through their direction, operation, management, and con-

trol of John Donnelly & Sons, a Massachusetts business Trust (corporate entity), with a business office and headquarters in Miami, Florida.

5. Defendants, Trustees of the Edward C. Donnelly, Jr. Revocable Trust, are the directors ("trustees") of the corporate entity, John Donnelly & Sons. This alone would not be sufficient to give this Court jurisdiction over the Defendants. However, Defendants, in their capacity and by their authority as Trustees of the Revocable Trust, are vested with the ultimate authority and control over the business done by John Donnelly & Sons in Florida. Article IX Section B of the Edward C. Donnelly, Jr. Revocable Trust provides this authority in the following language:

> After the death of the donor . . . in addition to the powers conferred by law and the powers hereinbefore set forth in Section A, the trustees are further authorized, from time to time, in their discretions and without order or license of any court;
>
> 1. To retain and continue to operate the business of John Donnelly & Sons for such period as they deem advisable;
>
> 2. To control, manage and direct the business of John Donnelly & Sons and to delegate all or any part of such powers to such person or persons as they may select;
>
> 3. To retain in said John Donnelly & Sons such amount of the net earnings for working capital and other purposes of said corporation as they may deem consistent with sound business practice.
>
> 4. To sell or liquidate all or any part of the business of said corporation.

6. The Trust Instrument gives Defendant Trustees the discretion to operate, control, manage and direct the business of John Donnelly & Sons themselves, and/or to delegate all or any part of their powers to such person or persons as they may select. In either case, the ultimate responsibility, authority and control of John Donnelly & Sons is placed by the Trust Instrument in the hands of Defendant Trustees.

7. Defendants have, in fact, operated, managed, directed and controlled the business of John Donnelly & Sons in Florida. PAUL MARK RYAN, Trustee of the Revocable Trust, has directed payment of John Donnelly & Sons' bills by John Donnelly & Sons' Vice-President and Treasurer in Miami. RYAN has directed John Donnelly & Sons' Vice-President and Treasurer to pay the salary of an employee of the Revocable Trust, and to withhold social security and workman's compensation payments for said employee. The Vice-President and Treasurer of John Donnelly & Sons in Miami required RYAN'S approval in order to sell a Florida subsidiary corporation of John Donnelly & Sons, in accordance with Article IX Section B of the Trust, which vests control of the sale or liquidation of "all or any part of the business of said corporation" in the Trustees of the Revocable Trust. The Vice-President and Treasurer of John Donnelly & Sons also required RYAN'S authorization in order that the First National Bank of Miami would honor the fac-

simile signature of said Vice-President and Treasurer on accounts originally set up by Mr. Edward C. Donnelly, Jr.

8. The Trustees of the Edward C. Donnelly, Jr. Revocable Trust are also doing business in Miami through transactions by and for the Revocable Trust itself. PAUL MARK RYAN, Trustee of the Revocable Trust, has directed the Vice-President and Treasurer of John Donnelly & Sons to issue Company checks to pay the salary of an employee of the Revocable Trust. RYAN has also directed the Company, through its Treasurer, to withhold social security and workman's compensation payments for this employee of the Revocable Trust.

9. The Revocable Trust also does business in Florida by borrowing money from John Donnelly & Sons in order to pay various claims and expenses of the Estate of Edward C. Donnelly, Jr. PAUL MARK RYAN, in his capacity as Trustee of the Revocable Trust, has directed the Treasurer of John Donnelly & Sons to advance substantial sums of money to the Trustees. The Trustees have then forwarded these funds to the Executors of the Donnelly Estate in order to enable the Executors to pay claims against the Estate. RYAN, as Trustee, has repaid John Donnelly & Sons with interest for these loans.

10. The Trustees of the Edward C. Donnelly, Jr. Revocable Trust are doing business in Florida through an agency relationship with the Executors of the Estate of Edward C. Donnelly, Jr. The Trust Instrument, Article IX Section D, establishes this agency relationship between the Trustees and the Executors in the following language:

> The trustees shall also pay out of said trust such of the donor's debts, funeral and burial expenses

> and the expenses of administering the donor's estate as may be requested by the donor's executor or administrator. The trustees may rely upon a certificate from the donor's executor or administrator to the effect that such taxes, interest, debts or expenses are payable; and the trustees need not inquire into the legality or amount of any tax, interest, debt or expense so certified. Payments pursuant hereto, may be made to or upon the order of the donor's executor or administrator or in such other manner as the trustee think advisable.

11. The purpose of this agency relationship is for the Executors to investigate, certify, and request payment by the Trustees of the claims, debts, and expenses of the Estate.

12. In fulfillment of this agency relationship, the Executors have, in fact, investigated, certified and requested payment by the Trustee of bills of the Estate, and the Trustees have paid such bills. Plaintiff has alleged and demonstrated to the Court that:

a) The Federal Estate Tax liability of the Estate of Edward C. Donnelly, Jr. was investigated by the Executors in accordance with their agency relationship with Defendants.

b) On July 15, 1974, PAUL MARK RYAN, as Trustee of the Revocable Trust, requested John Donnelly & Sons to advance the sum of $139,737.12 from its bank account in the State of Florida to the Trustees, which sum was to be paid as a second installment on the Federal Estate Tax liability of the Estate of Edward C. Donnelly, Jr.

c) Flagship First National Bank of Miami Beach, and William Archie Brown, as Executors, petitioned the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on or about January 21, 1975, for an order permitting their certification to the Trustees of a partial satisfaction of a claim in the sum of $135,000.00 by John Donnelly & Sons against the Estate of Edward C. Donnelly, Jr.

d) On January 27, 1975, the Court entered its Order directing the Executors to certify to the Trustees that the Estate is indebted to John Donnelly & Sons for amounts in excess of the Estate's assets and directing the Trustees to disburse $135,000.00 to John Donnelly & Sons in partial satisfaction of its claim.

13. The business being done in Florida by Defendant Trustees through their agency relationship with the Executors is the business of investigating, certifying, and paying the debts, claims and expenses of the Estate. By virtue of her timely election of dower, Plaintiff became a creditor of the Estate and her dower claim became a debt thereof. As a creditor of the Estate of Edward C. Donnelly, Jr., Plaintiff's cause of action arises directly out of the business being done by the Trustees in Florida through their direction and control of the payment of the debts of the Estate. Plaintiff has requested that the Estate's debt to her be duly paid. In refusing to pay this debt, Defendants have alleged that the assets claimed are not subject to Plaintiff's dower interest. This demand and refusal of payment constitutes the source of Plaintiff's cause of action. Thus, the requirement of "connexity" under Section 48.181 is satisfied, in that Plaintiff's cause of action arises out of a "transaction or operation connected with or incidental to" the business, business venture and/or agency

relationship relied on for jurisdiction. Fla. Stat. §48.181(1) (1975).

14. Moreover, the actions of Defendant Trustees in the operation, control, management and direction of the business of John Donnelly & Sons are also predicated on and derived from the alleged ownership by them of the shares of beneficial interest of John Donnelly & Sons. Plaintiff has claimed a dower interest in said shares of beneficial interest and, if her claim had been recognized by Defendant Trustees she would have been able to participate as a one-third owner in actions relating to the operation, control, management and direction of the Company. Thus, both Plaintiff's claim and the actions of Defendant Trustees arise out of a transaction or operation connected with or incidental to the business venture of John Donnelly & Sons and satisfy the "connexity" requirement under Section 48.181, Florida Statutes (1975).

In consideration of the foregoing findings, the Court concludes that service of process has been properly effected on the Defendants pursuant to Section 48.071, 48.161 and 48.181, Florida Statutes (1975), and that the Court has jurisdiction over the persons of these Defendants.
Accordingly, it is hereby

ORDERED and ADJUDGED that Defendants' Motion to Dismiss Plaintiff's Complaint, and Defendants' Motion to Quash Service of Process be, and the same hereby are, DENIED. The Defendants shall file their Answer to the Complaint herein within twenty (20) days of the date of this Order.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 8 day of February, 1977.

J. GWYNN PARKER
CIRCUIT COURT JUDGE

Copies furnished to:

Blackwell, Walker, Gray, Powers, Flick & Hoehl

Walton Lantaff Schroeder & Carson

APPENDIX D(1)

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

Civil Division
Case No. 75-7007

MARY ELIZABETH DONNELLY,
Plaintiff,

vs.

PAUL MARK RYAN, et al.,
Defendants.

MOTION TO DISMISS AND MOTION TO QUASH PURPORTED SERVICE OF PROCESS

COME NOW the defendants jointly and severally, as Trustees of the Edward C. Donnelly, Jr. Revocable Trust dated May 28, 1948, last amended October 8, 1968, and respectfully move the Court to dismiss the plaintiff's complaint herein and to quash the purported service of process upon the following grounds:

1. The Court lacks jurisdiction over the subject matter.

This case grows out of the estate of Edward C. Donnelly, Jr. deceased, which is pending in the Probate Division of this court under Probate No. 725304 and this cause

should properly be lodged in that same division of this court.

2. The Court lacks jurisdiction over the persons of these defendants and over the Revocable Trust.

There is no predicate or basis laid in the allegations of the complaint upon which it could be claimed that this Revocable Trust represented by these three Trustees is in any way involved in transacting business in the State of Florida. It is the shareholder only of a Massachusetts business trust known as John Donnelly & Sons, and as such shareholder transacts no business in the State of Florida. Please see affidavits of the three Trustees, Paul Mark Ryan, Arthur T. McManmon, and James M. Connolly, attached hereto and made a part hereof by reference and marked as Exhibits "A", "B" and "C" respectively.

3. There is an insufficiency of process.

4. There is an insufficiency of service of process.

The complaint shows on its face that the defendants and each of them, together with the Revocable Trust, are non-residents of the State of Florida. The affidavits hereto attached present factual information to this court to demonstrate that the attempted service of process by the plaintiff under Florida Statutes, Chapter 48.071, Chapter 48.161 and on a spurious agency relationship, is totally insufficient to provide *in personam* or *in rem* jurisdiction of this court over these defendants or the trust res.

5. The exercise of jurisdiction by this court over these defendants would violate Section 1 of the 14th Amendment of the Constitution of the United States and

Section 9 of Article I of the Constitution of the State of Florida.

6. The complaint fails to state a cause of action against these defendants or any of them.

7. The complaint fails to state a claim against these defendants upon which relief may be granted.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Charles P. Sacher, Esquire, Walton, Lantaff, Schroeder, Carson & Wahl, Attorneys for Plaintiff, 900 Alfred I. duPont Building, Miami, Florida, 33133 on this 19th day of May, A.D., 1975.

BLACKWELL WALKER GRAY
POWERS FLICK & HOEHL
Attorneys for Defendants

By /s/ Samuel J. Powers, Jr.
Samuel J. Powers, Jr.
2400 First Federal Building
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305 358-8880

APPENDIX D(2)

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

PROBATE DIVISION

CASE NO. 75-7007
(Div. 35 — J. Parker)

MARY ELIZABETH DONNELLY,
Plaintiff,

vs.

PAUL MARK RYAN, et al.,
Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTION TO QUASH PURPORTED SERVICE OF PROCESS

THE PLEADINGS

On February 28, 1975 Mary Elizabeth Donnelly (hereinafter "MED") filed what she denominated a complaint for satisfaction of dower against Paul Mark Ryan, Arthur T. McManmon and James M. Connolly, the trustees of the Edward C. Donnelly, Jr. Revocable Trust. This suit was filed on the civil side of the Dade County Circuit Court and on defendants' motion, has been reassigned to the Probate Division.

The complaint seeks a declaratory judgment that property held by the trustees was owned by Edward C. Donnelly, Jr. at the time of his death on October 15, 1972, or that, alternatively, the trust is illusory, testamentary, and therefore void. The complaint further seeks a decree requiring the trustees to distribute to the plaintiff a dower interest out of the trust property. Such a decree is properly directed at the executors of the probate estate, not strangers such as the trustees. This discrepancy highlights the ambivalent posture of MED in the action — in effect she is suing both as an executor (which she is) and as a dower claimant (which she is).

The complaint alleges on its face that the defendants as trustees of the Edward C. Donnelly, Jr. Revocable Trust are all non-residents of the State of Florida.

An affidavit in support of attempted long-arm statute service filed by MED further sets forth the non-residence of the three defendant trustees and provides their foreign residence in the State of Massachusetts.

The defendants have moved to dismiss and to quash the purported service of process for lack of jurisdiction over the subject matter, over the persons of these defendants, over the Revocable Trust, and on other grounds there stated.

In support of the motion of each of the three trustees has filed a complete affidavit demonstrating that each of the three are now and have been for many, many years, residents of the State of Massachusetts, have never been residents or domiciled in the State of Florida, that the trust was created in the State of Massachusetts in 1948 and restated in Massachusetts on October 8, 1968, that the

trust provides that it is to be governed and construed according to the laws of Massachusetts, that the trust does not now and since the donor's death has not:

(a) Owned any real estate in Florida;

(b) had any bank accounts in Florida;

(c) filed any tax returns or paid any taxes in Florida;

(d) had any tangible personal property in Florida;

(e) had an office or an office listing in Florida;

(f) transacted any business, as such, in Florida; or

(g) administered any of its assets in Florida.

That the only assets of the Edward C. Donnelly, Jr. Revocable Trust being sued in this case are 1,000 shares of stock in a Massachusetts business trust established August 24, 1940 known as John Donnelly & Sons (hereinafter referred to as "the Company").

In other words, the defendant trust in this litigation is a mere stockholder of the only existing shares of stock in a Massachusetts business trust. Incidentally, such Massachusetts business trust is treated for all intentions and purposes as a corporation under Massachusetts law.

That on November 10, 1960, the certificates representing these 1,000 shares of stock in the John Donnelly & Sons Massachusetts business trust was formally registered in the name of the trustees of the defendant trust, the Edward C. Donnelly, Jr. Revocable Trust, and thereafter formally deposited in the trust by Edward C. Donnelly, Jr. on November 10, 1960 in Boston, Massachusetts and has been retained in the custody of the trustees ever since.

That at all times the entire corpus of this trust has been located in Boston, Massachusetts.

That neither the defendant trust nor the trustees thereof have ever transacted business in the State of Florida.

IT IS OF INTEREST TO NOTE THAT THE PLAINTIFF, MARY ELIZABETH DONNELLY, HAS BROUGHT AN EARLIER ACTION ON MAY 18, 1973 AGAINST THE SAME DEFENDANT TRUSTEES OF THE SAME TRUST, SEEKING THEIR REMOVAL, IN THE SUPERIOR COURT IN EQUITY (#35-122) FOR MIDDLESEX COUNTY, MASSACHUSETTS, THEREBY RECOGNIZING THAT MASSACHUSETTS HAS JURISDICTION OVER THE TRUST AND ITS RES AND HAS SUBMITTED HERSELF TO SUCH JURISDICTION.

FACTUAL BACKGROUND

I. THE WILL

On October 15, 1972, Edward C. Donnelly, Jr. died in Florida. He had been a resident of Florida since about 1962. Prior to that he resided in Massachusetts.

His will was executed in Boston on May 18, 1970. Its first article bequeathed all his tangible personalty to MED, his third wife. The second article made pecuniary bequests totaling $7,500, to ten friends and relatives. The third article gave the residuary estate to the trustees of the "Edward C. Donnelly, Jr. Revocable Trust" to hold in trust according to that instrument. The complaint by MED is that certain property now held by the trustees belonged to Edward C. Donnelly, Jr. as of October 15, 1972. The will names executors, three of whom have qualified and are now co-executors: Flagship First National Bank of Miami Beach (formerly The Miami Beach First National Bank), William Archie Brown and MED.

The residuary clause incorporates by reference the Revocable Trust instrument against the contingency that the trust be not in existence at Edward C. Donnelly, Jr.'s death or that it be held invalid by some court. Therefore, the ownership of the disputed property as of October 15, 1972 is practically inconsequential as long as the will is followed. However, on January 26, 1973 MED made a timely election to take dower in lieu of taking under the will. Therefore, the ownership of the disputed property as of October 15, 1972 is the dispositive question as to the merits of MED's complaint.

On November 18, 1974, the Dade County probate court entered an order for assignment of dower upon the petition of the co-executors Flagship First National Bank of Miami Beach and William Archie Brown.* At the instance of MED, the court on December 17, 1974 issued an amended order which declared:

*Under former §733.10 and current §732.203, an executor petitions the probate court for an order authorizing or directing him to lay off and assign dower.

> This order does not adjudicate or determine the right, if any, of Mary Elizabeth Donnelly to dower in any assets, owned or claimed to be owned, by the Edward C. Donnelly, Jr. Revocable Trust.

The order further provided:

> By entering this order the court does not determine that it has jurisdiction to decide the issues set forth (sic) in the preceding paragraph.

Within three months of the amended order, MED filed the instant complaint.

II. THE EDWARD C. DONNELLY, JR. REVOCABLE TRUST: ESTABLISHMENT, AMENDMENTS AND TRUSTEES

The plaintiff's husband first established the Edward C. Donnelly, Jr. Revocable Trust on May 28, 1948. The settlor during his life always retained the power to alter, amend, and revoke the trust. On several occasions he exercised his power to amend the trust, sometimes re-stating it virtually entirely. The settlor was at all times until May 1, 1967, one of the trustees. On that date he purportedly executed the so-called Lappin Amendment, a general revision of the trust which neglected to name him trustee. On January 25, 1968, the settlor exercised his Article IV (A) (3) power under the Lappin instrument to change the identity and number of the trustees. In lieu of Robert S. Lappin, the National Shawmut Bank, and MED, he substituted himself and Paul Mark Ryan. Thereafter, on October 8, 1968, the settlor made a general amendment of the

Trust, in which he and Paul Mark Ryan remained as Trustees.

The 10/8/68 amendment was in force when Edward C. Donnelly, Jr. died. Thereafter, on October 27, 1972, his sister, Mary Aline Donnelly Stuart and James M. Connolly became trustees pursuant to Article VIII (A) of the trust. In October of 1973 Mary Aline Donnelly Stuart resigned, and Arthur T. McManmon succeeded her pursuant to Article VIII (B) of the trust.

The settlor was a Massachusetts resident until about 1962. He executed in Massachusetts each amendment to the Trust and appointment of trustee(s) both before and after 1962. Since October 8, 1968, the trustees have been Massachusetts residents exclusively.

III. THE EDWARD C. DONNELLY, JR. REVOCABLE TRUST: CORPUS

The trust has possessed only two kinds of assets, life insurance policies and shares in the family business. The 10/8/68 amendment listed eleven life insurance policies with an aggregate face amount of $250,000. The trustees' collection of insurance proceeds was delayed considerably because MED contested the validity of the settlor's 1968 acts which replaced the Lappin Amendment trustees with himself and Paul Mark Ryan and which revised the terms of the trust. By now the trustees have collected all insurance proceeds payable.

Currently the sole asset of the trust is 1,000 shares of John Donnelly & Sons. John Donnelly & Sons is a multi-state outdoor advertising business in the form of a Massachusetts business trust. The 1,000 shares have

represented the entire beneficial interest in John Donnelly & Sons since 1960, when the company redeemed 1,000 shares owned by the estate of Edward C. Donnelly, Jr.'s brother, John.

IV. THE COMPANY: JOHN DONNELLY & SONS, A MASSACHUSETTS BUSINESS TRUST

The Edward C. Donnelly, Jr. Revocable Trust owns the entire beneficial interest in John Donnelly & Sons, a Massachusetts business trust. The company itself is a multi-state outdoor advertising business.

It is both an operating and a holding company. It sells advertising directly in Massachusetts, primarily in and around Boston. It owns 100% of sixteen corporations. Most of the active subsidiaries are in the business of selling advertising directly.

The Donnelly companies file a consolidated federal income tax return. The greatest volume of sales occurs in the Boston area (JD&S), the Baltimore area (Donnelly Advertising Corporation of Maryland), and in Florida (Donnelly Advertising Corporation of Florida, and Empire Advertising Industries, Inc.). Other divisions operate in Virginia, Maine, and the Worcester, Massachusetts area. The state of Vermont has undertaken to take most of the assets of the Vermont division by eminent domain. The aggregate gross revenues of the Donnelly companies is in the vicinity roughly of $15,000,000.

STATUTORY REQUISITES FOR JURISDICTION

The fundamental basis at common law for any court's jurisdiction over the person of any defendant is the

physical presence of that defendant within the territory of the court's jurisdiction. A court may exercise jurisdiction over a person not present in that territory if a statute authorizes such exercise. The trustees are not residents of Florida, and they were not served while in Florida. Therefore, the Dade County Court may exercise jurisdiction over the defendants only if some Florida statute so authorizes. Statutes authorizing the exercise of jurisdiction over nonresidents are called "long-arm statutes."

Two long-arm statutes are currently in force in Florida. The older one is Florida Statute §48.181*. In

*§48.181 — *Service on nonresident engaging in business in state*

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

(2) If a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer.

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person, firm or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.

brief, it authorizes jurisdiction over nonresidents doing business in Florida in cases arising out of that business. It has been in substantially the same form since 1951. The newer statute is §48.193*, which became effective on July 1, 1973. It differs from §48.181 in that it catalogues a number of comparatively specific grounds for jurisdiction, whereas §48.181 recites a more general requirement.

A third long-arm statute, §48.182, was passed in 1970 (Laws 1970 c.70-90 §1). The current §48.193 replaced it as of July 1, 1973.

§48.193 — *Acts subjecting persons to jurisdiction of courts of state*

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

(a) Operates, conducts, engages in, or carries on a business venture in this state or has an office or agency in this state.

(b) Commits a tortious act within this state.

(c) Owns, uses, or possesses any real property within this state.

(d) Contracts to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

The complaint alleges jurisdiction in reliance upon §48.181 (1), the older long-arm. It does not mention §48.193 at all.

(f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:

1. The defendant was engaged in solicitation or service activities within this state which resulted in such injury; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use of consumption resulted in the injury.

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in §48.194. The service shall have the same effect as if it had been personally served within this state.

(3) Only causes of action arising from acts or omissions enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section, unless the defendant in his pleadings demands affirmative relief on other causes of action, in which event the plaintiff may assert any cause of action against the defendant, regardless of its basis, by amended pleadings pursuant to the rules of civil procedure.

(4) Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereinafter provided by law.

Added by Laws 1973, c.73-179, §1, eff. July, 1973.

The subjection of the defendants to §48.181 long-arm jurisdiction depends on two conditions. The plaintiff must show: (1) first, that the defendants have "operated, conducted, engaged in, or carried on a business or business venture in the state, or . . . have (had) an office or agency in the state," and (2) second, that the plaintiff's action is one "arising out of any transaction or operation connected with or incidental to the business or business venture." This memorandum refers to the first condition as the doing business requirement, and the second as the "connexity" requirement (the court in Youngblood v. Citrus Association of the New York Cotton Exchange, Inc., 276 So.2d 505 (Fla. App. 1973) employed the term "connexity").

The complaint divides its assertion of jurisdiction into two parts. The first (Paragraphs 28-41) it designates "Transaction of Business in Florida," and the second (Paragraphs 42-52) "Employment and Utilization of Agents in Florida." This breakdown conforms to the phrasing of the doing business requirement of §48.181 (1), which apparently distinguishes between (a) operating a business and (b) maintaining an office or agency. The apparent distinction is not particularly important, since the phrasing of the connexity requirement reflects no distinction between doing business and having an agent. It refers only to "the business or business venture." Hence a nonresident who "has an office or agency" in Florida is subject to §48.181 jurisdiction only if the maintenance of such office or agency amounts to a "business or business venture," in the language of the connexity requirement. In short, if the plaintiff seeks to show that the defendants have an agent in Florida, she must also show that the engagement of such an agent is a "business or business venture" in order to satisfy the connexity requirement.

ALLEGED GROUNDS FOR JURISDICTION

The plaintiff advances two grounds for *in personam* jurisdiction of Ryan, Connolly and McManmon. Paragraphs 28 through 41 contend that the defendants have operated a "business venture" in Florida within the meaning of §48.181 (1) F.S. This is based on apparently three separate theories. One that Ryan and McManmon were physically present in the state of Florida at one time, and the other two on an attempted attribution to the defendants of the acts of other parties, one a natural person, Edward C. Donnelly, Jr. (deceased), and of one outdoor advertising business, John Donnelly & Sons.

THE LAW

1. THE CONTROLLING HANSON v. DENCKLA CASE

It is respectfully submitted that the jurisdictional issues in this case are controlled by the case of Elizabeth Donner Hanson, et al. v. Katherine N. R. Denckla, et al., 357 U.S. 235, 2 L.Ed 2d 1283, 78 S. Ct. 1228, decided June 23, 1958

A. THE FACTS OF HANSON v. DENCKLA

In 1935, Dora Browning Donner, a resident of Pennsylvania, entered into an agreement with the Wilmington Trust Company ("Wilmington") whereby she deposited certain securities with Wilmington to be held in trust. The securities were delivered to Wilmington in Delaware and remained in Delaware under the possession and administration of Wilmington. The trust assets were

never in Florida and Wilmington had no office in Florida and transacted no business there.

By the terms of the 1935 Agreement, Wilmington was to manage, invest and reinvest the corpus and to pay the net income to Mrs. Donner for life. Mrs. Donner reserved a power of appointment exercisable either by *inter vivos* instrument or by will. The agreement provided that, failing the exercise of the power, the corpus was to be distributed by Wilmington on Mrs. Donner's death to her surviving issue or to her next of kin.

It was provided that certain of the trust powers given to Wilmington could be exercised only under the direction or consent of a "trust advisor." These controlled powers were the powers (1) to sell trust assets, (2) to invest the proceeds from the sale of trust assets and (3) to participate in mergers and reorganizations of corporations whose securities were held by the trust. Mrs. Donner designated the trust advisor in the agreement and reserved the right to nominate other advisors at any time. She also reserved the power to revoke, alter or amend the agreement in whole or in part at any time, and the right to change the trustee. In addition, Mrs. Donner once withdrew $75,000.00 from the corpus, but later replaced it.

Mrs. Donner moved from Pennsylvania to Palm Beach County, Florida in 1944. While a resident of Florida, she paid Florida taxes on the trust assets. She remained a Florida domiciliary until her death in 1952. In 1949, Mrs. Donner executed a non-testamentary instrument in Florida by which she purported to exercise her power of appointment. (There had been two previous instruments exercising the power of appointment which were specifically revoked by the 1949 instrument, and a 1950 in-

strument amended the 1949 instrument in a minor aspect.) The 1949 instrument directed Wilmington to pay over a total of $417,000.00 on Mrs. Donner's death to certain named beneficiaries. On the same day in 1949, Mrs. Donner executed her Last Will and Testament. The will contained a residuary clause which specifically included in the residuary estate the balance of the trust property over which Mrs. Donner possessed a power of appointment that had not been effectively appointed during her lifetime.

At Mrs. Donner's death, the trust corpus held by Wilmington under the 1935 agreement amounted to just under $1,500,000.00. Pursuant to the 1949 instrument, Wilmington thereafter distributed cash and securities aggregating $417,000.00 and deposited the balance to the account of the executrix and trustee under the will.

B. COMPARISON OF FACTS IN DENCKLA AND IN DONNELLY

DENCKLA — 1. The real issue before the lower courts in both actions was the validity of the appointment and, ultimately, of the trust.

DONNELLY — 1. The issues in this action are the ownership of the "trust assets" at the time of the decedent's death and the validity of the trust.

DENCKLA — 2. The trustee had no office in Florida and transacted no business there.

DONNELLY — 2. The individual trustees of the Edward C. Donnelly, Jr. Revocable Trust are all domiciliaries of Massachusetts and have never been

Florida domiciliaries. The Edward C. Donnelly, Jr. Revocable Trust does not conduct business in Florida.

DENCKLA — 3. The non-resident trustee was not served personally and did not appear. It received constructive service.

DONNELLY — 3. The trustees were not personally served and they do not intend to appear. They received constructive notice of the action as well as notice of service upon the Secretary of State of Florida as the alleged designated agent of the trustees and upon one of the co-executors of the estate of Edward C. Donnelly, Jr. as the alleged agent of the trustees.

DENCKLA — 4. The corpus of the trust was securities.

DONNELLY — 4. The corpus of the trust is 1,000 shares of John Donnelly & Sons.

DENCKLA — 5. The trust assets were delivered to the trustee in Delaware and at all times remained in Delaware.

DONNELLY — 5. The trust assets were deposited with the trustee in Massachusetts and have remained under the custody of the trustee in Massachusetts at all times.

DENCKLA — 6. The will was executed and probated in Florida.

DONNELLY — 6. The will was executed in Massachusetts and probated in Florida.

DENCKLA — 7. The settlor was a resident of Pennsylvania at the time the trust was created.

DONNELLY — 7. The settlor was a Massachusetts resident when the trust was created. All amendments to the trust and appointments of trustees were executed in Massachusetts.

DENCKLA — 8. The settlor moved to Florida in 1944 and remained there until her death in 1952.

DONNELLY — 8. The settlor was a Massachusetts resident until about 1962 when he moved to Florida until his death in 1972.

DENCKLA — 9. The settlor reserved the life income from the trust assets and a power of appointment over the assets. The settlor reserved the power to revoke, alter or amend in whole or in part at any time. A "trust advisor" appointed by the settlor held power over the trustee in certain situations, e.g. selling off trust property.

DONNELLY — 9. The settlor maintained complete control over the trust assets during his lifetime including power over the net income of the trust. Settlor retained the power to revoke, alter or amend the trust.

DENCKLA — 10. The settlor paid Florida taxes on the trust assets.

DONNELLY — 10. The trust assets were listed on the Florida intangible tax returns of the settlor by mechanical error.

C. THE DENCKLA LITIGATION

In January, 1954, the two residuary legatees under the will brought action in Florida naming as defendants the

executrix of the will, Wilmington and others who were interested in the assets either directly or indirectly by reason of the appointment or by the residuary clause of the will. In this action and in all subsequent litigation, the subject of the dispute was the $417,000.00 distributed by Wilmington under the 1949 instrument. The dispute was divided into two groups: The residuary legatees ("legatees") named in the will, and the appointees and beneficiaries ("beneficiaries") named in the 1949 instrument. The legatees claimed that the appointment under the 1949 instrument did not pass a present interest and it was thus testamentary. Since the instrument did not comply with the Florida Statute of Wills, it was invalid and the $417,000.00 thus passed through the residuary clause of the will. The beneficiaries argued simply that the appointment did pass a present interest and that the distribution by Wilmington of the $417,000.00 was thus effective.

The Florida action sought a declaratory judgment to determine what property passed under the will and the authority of the executrix over the assets held by Wilmington under the 1935 agreement. *Neither Wilmington nor certain other named, non-resident defendants were served personally in the action and they did not appear.* The non-resident defendants were sent copies of the pleadings along with a "Notice to Appear and Defend" by ordinary mail, and notice was published locally pursuant to Florida Statutes §48.01 and 48.02 dealing with constructive service.

In January, 1955, the Florida court entered its decree holding that it lacked jurisdiction over the trust assets and over the non-answering, non-resident defendants and dismissing the action as to those defendants. However, as to the parties before the court, it was held that no present in-

terest passed under the 1949 instrument which was invalid as a testamentary instrument and that, therefore, the assets held by Wilmington under the 1935 agreement passed under the residuary clause of the will.

The Florida Supreme Court handed down its decision in September, 1956, Hanson v. Denckla, 100 So.2d 378, affirming that part of the decree which adjudged the invalidity of the trust and the appointment, and reversing that part which held that Florida had no jurisdiction over the trust and over the non-resident defendants. The Florida Supreme Court held that constructive service was valid because the lower court had subject matter jurisdiction over the construction of the will. The court reasoned that it is not necessary that the *res*, the trust assets, be physically present in the state in order for constructive service to be binding on a non-resident where the issue presented for the court's adjudication required a determination of the validity of the trust. While the Florida Supreme Court found jurisdiction based on the fact that the will was probated in Florida, it is unclear whether the jurisdiction referred to is *in rem* jurisdiction over the trust assets or *in personam* jurisdiction over the non-resident defendants.

In July, 1954, while the Florida action was pending, the executrix and trustee under Mrs. Donner's will brought an action in Delaware seeking a declaratory judgment to determine the persons entitled to assets held at the time of Mrs. Donner's death by Wilmington under the 1935 agreement. After the Florida decree was rendered, the legatees urged its estopping effect on the Delaware court as to the validity of the 1935 agreement as a trust agreement. The Delaware court in its decree refused to recognize any estopping effect of the Florida decree,

holding that *res judicata* could not be applicable since the two actions were based on separate causes of action. The Delaware court further held that collateral estoppel could not apply because the Florida court's determination that the trust was invalid was merely implicit in and incidental to the main issue of determining what passed under the residuary clause of the will. It was opined that it would be contrary to the public policy of the State of Delaware for the Delaware court to be collaterally estopped on an issue which was incidentally determined in a sister state on another cause of action in which the foreign court lacked jurisdiction over both the trust and the trustee. Hanson v. Wilmington Trust Company, 119 A.2d 901 (1955).

The legatees invoked the Full Faith and Credit Clause of the United States Constitution for the first time on appeal to the Delaware Supreme Court. *Because Wilmington was never served personally with Florida process and never appeared in the Florida litigation, the Delaware Supreme Court held that the Florida decree must be denied full faith and credit as asserted against Wilmington.* As a judgment *in rem*, the Florida decree was denied full faith and credit since the trust assets were never subjected to the control of the Florida court. The Delaware Supreme Court upheld its lower court in refusing to give to the Florida decree the effect of *res judicata* or collateral estoppel. Lewis v. Hanson, 128 A.2d 819, (1957).

The matter finally reached the United States Supreme Court on certiorari to the Supreme Court of Delaware and also on certiorari to the Supreme Court of Florida. The Supreme Court affirmed the Delaware judgment and reversed the Florida judgment in a 5-4 decision. Hanson v. Denckla, 357 U.S. 235, 2 L.Ed 2d 1283, 78 S. Ct. 1228 (1958). The issues presented to the court were (1) Whether

Florida erred in holding that it had jurisdiction over the non-resident defendants and (2) Whether Delaware erred in refusing full faith and credit to the Florida decree. As to the first issue, the legatees contended that the Florida judgment was offensive to the Due Process Clause of the Fourteenth Amendment because the Florida court was without jurisdiction. The defect alleged was the absence of those "affiliating circumstances" which enable a state court to take jurisdiction.

The majority opinion written by *Chief Justice Warren* rejected the Florida court's opinion that authority over the probate and construction of its domiciliary's will, under which the disputed assets might pass, was sufficient to confer jurisdiction; (the court noting that the Florida court failed to designate over what it had invoked jurisdiction.) The Supreme Court also rejected the contention that the Florida court possessed *in rem* jurisdiction over the trust assets (assuming arguendo, that the trust was invalid so that Mrs. Donner was the owner of the assets) because the decedent was a domiciliary of Florida. *The court therefore reversed the Florida judgment insofar as it rested upon in rem jurisdiction.*

In urging that the circumstances of the case constituted sufficient affiliation with the State of Florida to enable its courts to exercise *in personam* jurisdiction over the non-resident trustee, the legatees relied principally upon McGee v. International Life Insurance Company, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S. Ct. 199 (1957). The court cautioned that although McGee noted the trend of expanding personal jurisdiction over non-resident defendants, the defendant must have the "minimal contacts" with a state for its courts to exercise their jurisdiction over them. These "minimal contacts" were found to be lacking

in this case where the defendant trustee had (1) no office in Florida, (2) transacted no business in Florida, (3) never held or administered trust assets in Florida and (4) never solicited business in Florida. The Supreme Court further noted that, unlike McGee, the cause of action did not arise out of an act or transaction consummated in the forum state.

The legatees argued that the exercise of the power of appointment by Mrs. Donner in Florida gave Florida a substantial contact upon which to base *in personam* jurisdiction. The court rejected this contention noting that the issue had been the validity of the 1935 agreement and not the appointment:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State [sic], thus invoking the benefit and protection of its laws. Id. at 1298.

Finally, the court rejected the argument that because the settlor and most of the appointees and beneficiaries were domiciliaries of Florida, the court in that state should be able to exercise *in personam* jurisdiction over the non-resident trustee. The court stated that while a center of gravity approach may be sufficient for choice of law questions, it cannot be urged in support of personal jurisdiction over non-resident defendants.

In 72 Harv. L. Rev. 695, 704, Professor Austin W. Scott, one of the leading authorities on trusts in this country, in an exhaustive comment on Hanson v. Denckla said this:

But surely the mere fact that a testator provides in his will for the disposition of property not previously effectively disposed of by him does not give to the state in which he is domiciled at his death jurisdiction to determine the effectiveness of all dispositions previously made by him of property outside the state to persons not subject to the jurisdiction of the state. A bequest of all property which he should own at his death does not give a court of his domicile jurisdiction to determine the validity of his claim to ownership of property in other states also claimed by persons not domiciled in the state. As Mr. Chief Justice Warren said, jurisdiction cannot be predicated upon the contingent role of the Florida will, and 'If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation.'

The Supreme Court reversed the Florida judgment as far as it rested upon personal jurisdiction over the trustee as to the trustee and also as to all parties since, under Florida law, the trustee was an indispensable party in the adjudication of the validity of the trust. For the same reasons compelling reversal of the Florida judgment, the Delaware judgment was affirmed.

D. THE IMPACT OF THE DENCKLA RULING

The Denckla case made it clear that the only contacts that are relevant to jurisdiction are those contacts which the non-resident defendant *itself* had with the forum. Thus, such contacts as where the will was probated or

where the settlor of the trust was domiciled at any time are not relevant to the issue of *in personam* jurisdiction.

II. *FLORIDA LONG-ARM STATUTE REQUIREMENT OF CONNEXITY*

The word connexity was first applied by the Appellate Court of Florida to the long-arm statutes in the case of Youngblood v. Citrus Assoc. of N.Y. Cotton Exch., Inc., Fla. App. (1973) 276 So.2d 505.

In that case service upon a non-resident defendant was quashed and the holding affirmed on appeal where the defendant Association was held to have insufficient contact with the State of Florida, and also that the facts did not show the connexity required by §48.081 F.S. The court stated:

> Therefore, we determine that the requirements of doing business and connexity as delineated in Florida Statute §48.181 (1971), F.S.A., must be read in pari materia with Florida Statute §48.081 (1971), F.S.A. Our determination is supported by other Florida cases which have resolved similar problems. (Cases cited)
>
> * * *
>
> In summary, the burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court Zirin v. Charles Pfizer & Co., supra. This party must show, when attempting to serve a foreign corporation not qualified to do business in the State of Florida, that the requirements of Florida Statute §48.181, F.S.A. (namely, doing business and connexity) have been met and that process

> has been served upon a person qualified to accept such process. We would note at this point that the question of due process or 'minimum contacts' is not properly discussed if a showing of doing business has been made as the doing business requirement necessarily includes the concept of minimum contacts. Wherefore, as appellants argue that connexity is not required, while in fact it is required, and as no showing of connexity has been made, service cannot be sustained under Florida Statute §48.081, F.S.A., when read in pari materia with §48.181 (1971).

In her action to satisfy dower, Mrs. Donnelly is directly attacking the validity of the Edward C. Donnelly, Jr. Revocable Trust. The rule in Florida, as recognized in Denckla, is that in any action concerning the validity of a trust, the trustee is an indispensable party. Thus, for the Florida court to entertain this action, it must be able to exercise jurisdiction over the trustees.

The defendant trustees in this Florida action are non-residents and are not consenting to jurisdiction of the Florida court over them. Therefore, the plaintiff must rely upon the Florida Long-Arm Statutes authorizing jurisdiction over non-resident defendants under certain circumstances. Florida Statutes §48.181 authorizes jurisdiction over a non-resident when (1) a non-resident is conducting business in Florida and (2) the cause of action arises out of that business. However, the cause of action in this case involves the validity of the Edward C. Donnelly, Jr. Revocable Trust, and it seems clear that the Massachusetts Revocable Trust is not engaged in any business in Florida. Further, because there is no connexity between the cause of action and the purported business ac-

tivity, the requirements of §48.181 are not met and cannot be used to confer jurisdiction over the defendant trustees.

The very recent case of W. R. Esberger v. First Florida Business Consultants, Inc., Fla. App. (1976) 338 So.2d 561 in reversing the denial of a motion to quash service under the Florida Long-Arm Statutes, specifically held as follows:

> It is well established that Florida's long-arm statute is to be strictly construed. Lyster v. Round, 276 So.2d 186 (Fla. 1st DCA 1973); Wm. E. Strasser Const. Corp. v. Linn, 97 So.2d 458 (Fla.1957). To perfect service pursuant to Sections 48.161 and 48.181, Florida Statutes, the complaint must allege the jurisdictional requirements prescribed by the statute. Henschel-Steinau Co. v. Harry Schorr, Inc., 302 So.2d 198 (Fla. 4th DCA 1974). The plaintiff is required to allege that the cause of action arises from business activities conducted in the state and that the defendant is either a resident of a foreign state or country, a resident of Florida who subsequently becomes a non-resident, or a resident of Florida who conceals his whereabouts. See O'Connell v. Loach, 203 So.2d 350 (Fla. 2d DCA 1967), Section 48.181, Florida Statutes. The complaint filed by appellee is silent as to the residence of appellant and does not adequately allege that the cause of action arose from business activities conducted within this state.

Please see also the recent case of John Blue Company v. Roper Pump Company, Fla. App. (1975), 324 So.2d 147, wherein the Third District reversed denial of a motion

to quash specifically on the issue that connexity had not been shown under the Youngblood case, *supra*.

The plaintiff has by no means sustained her burden of establishing the contacts with the Florida jurisdiction of the defendant trustees of the Edward C. Donnelly, Jr. Revocable Trust required under the long-arm statutes.

Further, the plaintiff has not attempted in any way to go forward and show connexity between said alleged contacts and her cause of action herein as required by the Florida long-arm statutes.

CONCLUSION

It is respectfully submitted therefore that the non-resident defendants' motion to dismiss and to quash purported service of process should be granted.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to Walton, Lantaff, Schroeder, Carson & Wahl, Attorneys for Plaintiff, 900 Alfred I. duPont Building, Miami, Florida, 33131, on this 26th day of January, 1977.

Respectfully submitted,
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APPENDIX D (3)

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

Case No. 77-431

PAUL MARK RYAN, ARTHUR T. MCMANMON,
JAMES M. CONNOLLY, Trustees of the
EDWARD C. DONNELLY, JR. REVOCABLE TRUST
dated October 8, 1968,

Appellants,

vs.

MARY ELIZABETH DONNELLY,

Appellee.

* * *

B. The Plaintiff Did Not, And Cannot, Show That Her Cause Of Action Arose Out Of The Defendants' Business In The State Because The Alleged Activities Of The Defendants In Florida Occurred After The Plaintiff's Cause of Action Arose.

This appeal can be resolved simply and correctly by applying the commonsense rule enunciated by the Florida courts that a nonresident cannot be subject to service of process under Florida's "doing business" long-arm statutes (Sections 48.181 and 48.071) if the plaintiff's cause of action arose *before* the nonresident was operating, conducting, engaging in, or carrying on a business or business venture in the state or before it had an office or agency in the state. American Baseball Cap, Inc. v. Duzinski, 308

So.2d 639 (Fla. 1st DCA 1975); Masters, Inc. v. Corley, 222 So.2d 465 (Fla. 3d DCA 1969); Baker v. Commercial Travelers Mutual Accident Association Of America, 150 F.Supp. 725 (S.D. Fla. 1955); *see* Henschel-Steinau Co. v. Harry Schorr, Inc., 302 So.2d 198, 199 n. 3 (Fla. 4th DCA 1974); Lipman v. Zuk, 244 So.2d 496 (Fla. 3d DCA 1970). That is, the "connexity" requirement of the long-arm statutes cannot possibly be met if the defendants were not "doing business" in the state at the time the plaintiff's cause of action arose. American Baseball Cap, Inc. v. Duzinski, 308 So.2d at 644.

In this case, the plaintiff's cause of action — a claim "for a dower interest in all assets held or claimed to be held by the Trustees under the Edward C. Donnelly, Jr. Revocable Trust dated October 8, 1968" (A. 3) — clearly arose at the time of her husband's death (October 15, 1972). This is so because dower rights become vested only upon death, In re Ginsberg's Estate, 50 So.2d 539 (Fla. 1951); Bowler v. Bowler, 159 Fla. 447, 31 So.2d 751 (1947); Bennett v. Bennett, 157 Fla. 627, 26 So.2d 650 (1946); Robison v. Krause, 136 So.2d 373 (Fla. 2d DCA 1962), and because all claims for dower relate back to the time of death. Griley v. Griley, 43 So.2d 350 (Fla. 1949); Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936); Murphy v. Murphy, 125 Fla. 885, 170 So. 868 (1936); *see* in re Estate of Geringer, 300 So.2d 710 (Fla. 3d DCA 1974), *cert. denied* 311 So.2d 114 (Fla. 1975).

Furthermore, all of the specific transactions or operations from which the plaintiff alleges that her claim arose took place prior to or at the time of her husband's death. In Count I of her complaint (A. 10-11), the plaintiff alleges that Edward Donnelly, Jr. did not effectively deliver his shares of the business trust to the trustees of the revocable

trust during his lifetime thereby leaving ownership of the shares in himself; clearly the inadequacy of any such delivery transaction must relate to the time prior to E.C.D., Jr.'s death. In Count II (A. 11-13), the plaintiff alleges that the inter-vivos revocable trust created by E.C.D., Jr. was illusory and testamentary and therefore invalid. Just as clearly as with Count I, the allegation of a defectively created and administered trust must refer to a time prior to the death of E.C.D., Jr. In Count III (A. 14), the plaintiff alleges that her dower interest constitutes a debt against E.C.D., Jr.'s estate; obviously that debt, if it actually exists, arose at the time of E.C.D., Jr.'s death when the plaintiff's right to dower vested. *See, e.g.*, in re Ginsberg's Estate, 50 So.2d at 541.

Thus, the plaintiff's cause of action arose *before or at the time of her husband's death*. But all of the defendant's activities cited by the trial judge in his order of February 8, 1977 (A. 127-134) and by the plaintiff in her complaint and memos of law and fact (A. 7-10, 81-118, 135-402) as evidence of the trustees of the revocable trust doing business in Florida took place *after the death of E.C.D., Jr.*

To be more specific, the defendants could not possibly have been doing business in Florida through an agency relationship with executors of the estate of Edward C. Donnelly, Jr. at the time the plaintiff's cause of action arose, as stated by the trial judge (A. 130-133, paragraphs 10-13) and by the plaintiff (A. 8-10, paragraphs 42-52; 28-36; 82; 91-92; 162-170), because the executors were not appointed and did not perform any of their functions until after the death of E.C.D., Jr. Consequently, the plaintiff's cause of action could not have arisen out of any transaction or operation performed by the alleged agents of the defendants because those agents had not even been ap-

pointed, let alone functioning, at the time of E.C.D., Jr.'s death. There has not been, nor can there be, the showing of a connection ("connexity") between the activities of the alleged agents' activities in Florida and the plaintiff's cause of action as required by the long-arm statutes.

In the same manner, the defendants could not have been doing business in Florida through "transactions"[3] by and for the revocable trust itself at the time the plaintiff's cause of action arose, as suggested by the trial judge (A. 130, paragraphs 8-9) and by the plaintiff (A. 82, 156-161), because all of those transactions took place well after the death of E.C.D., Jr. As a result, the plaintiff's cause of action could not possibly have arisen from these transactions, as required by the long-arm statutes, because they simply had not yet been performed at the time the plaintiff's cause of action arose. There has not been, nor can there be, a showing of "connexity" between the alleged transactions of the revocable trust in Florida and the plaintiff's cause of action.

Finally, the defendants could not have been doing business in Florida through their "direction, operation, management, and control" of the business trust at the time the plaintiff's cause of action arose, as declared by the trial judge (A. 128-130, paragraphs 4-7) and by the plaintiff (A. 7-8, paragraphs 28-41; 16-27; 82-91; 137-155), because the defendants had no effective control over the business trust at the time of E.C.D., Jr.'s death. At that point their ownership interest was merely as stockholders, which

[3]Note that the trial judge's word — "transactions" — (A. 130, paragraph 8) is exactly the same word used in Section 48.181 (1), Florida Statutes, which requires that the plaintiff's cause of action arise from a "transaction or operation connected with or incidental to" doing business in Florida.

clearly is not sufficient to consider them as "doing business" in the state. Uible v. Landstreet, 392 F.2d 467 (5th Cir. 1968). The provision of the revocable trust upon which the trial judge placed reliance to proclaim that the defendants legally had management control, not just shareholder control, over the business trust did not, *by its own terms*, take effect until after the death of E.C.D., Jr. (A. 128-129, paragraphs 5-6). And all of the activities of the defendants relied upon by the trial judge as a basis for establishing their actual control of the business trust took place after the death of E.C.D., Jr. (A. 129-130, paragraph 7). The plaintiff herself alleged in her complaint that the defendants exercised no control whatsoever over the business trust up to the time of E.C.D., Jr.'s death (A. 8, paragraph 35; A. 11, paragraph 57).

Clearly, the plaintiff's cause of action could not have arisen from the defendants' management of the business trust because they had no effective control prior to or at the time of the death of the plaintiff's husband. There has not been, nor can there be, a showing of "connexity" between the alleged control of the business trust by the defendants and the plaintiff's cause of action.

Indeed, there can be no showing of "connexity" between *any* activities of the defendants and the plaintiff's cause of action because the defendants simply had *no* activities in Florida at the time the plaintiff's cause of action arose, i.e., at the time of her husband's death. As a result, the attempted service on the defendants by service on the Secretary of State and by service on their alleged agents in Florida is invalid and ineffectual to give the trial court jurisdiction over the persons of the defendants.

The argument contained in this section is itself sufficient reason why the trial judge's order of February 8, 1977 should be reversed. Nonetheless, we believe that it is appropriate to discuss all of the other factors raised by the trial judge in his lengthy opinion to show that none of them satisfy the two key requirements of the long-arm statute Section 48.181 (1), Florida Statutes (1975).

* * *

Supreme Court, U. S.
FILED
JUL 5 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

October Term, 1977

NO. 77-1739

PAUL MARK RYAN, ARTHUR T. McMANMON, JAMES M. CONNOLLY, Trustees of the EDWARD C. DONNELLY, JR. REVOCABLE TRUST,

Petitioners,

vs.

MARY ELIZABETH DONNELLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION
(With Appendix)

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NO. 77-1739

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BRIEF OF RESPONDENT IN OPPOSITION
(With Appendix)

QUESTION PRESENTED

Respondent disagrees with petitioners' statement that the Circuit Court of Dade County, Florida held that Florida courts have personal jurisdiction over non-resident petitioners on the sole ground that they are doing business in the state. In actuality, the Circuit Court's order states that the Florida courts have personal jurisdiction over the non-resident petitioners on the grounds that they were engaged in a business or business venture in the state, both personally and through agents, *and* that the respondent's cause of action arose out of petitioners' business activities in the forum state. Thus, petitioners' "question presented" has already been resolved by the state trial court and does not present a substantial federal question warranting review by this Court.

STATEMENT OF THE CASE

Respondent's complaint in the Circuit Court of Dade County, Florida sought recovery of property in which she claims an ownership right. The property in question consists of all of the issued and outstanding shares of beneficial interest (stock) in John Donnelly & Sons, a Massachusetts business trust (corporation) doing business in Florida. Respondent alleged, *inter alia*, that the stock was the personal property of her late husband, Edward C. Donnelly, Jr., at the time of his death, and that the trust instrument under which petitioners claimed ownership of the stock was illusory, testamentary and therefore void.

Respondent's ownership right originated in and was perfected through her timely and proper election of dower. Her *cause of action*, however, arose out of her demand and petitioners' refusal to honor her ownership right, and petitioners' subsequent and continuing retention, control, and exercise of dominion over the stock through business activities conducted in Florida. Moreover, respondent's complaint also set forth a cause of action arising out of petitioner's failure, personally and through their agents, the executors of the estate of Edward C. Donnelly, Jr., to perform certain duties owing to respondent.

Petitioners were served by substituted service of process on the secretary of state of Florida and also by service of process on their agents in Florida pursuant to Sections 48.071, 48.161 and 48.181, Florida Statutes (1975), on the ground that petitioners, personally and through agents, were engaged in a business or business venture in the state of Florida out of which respondent's cause of action arose. (Petitioners' Appendix C, paragraph 3).

Petitioners moved to dismiss the complaint and quash service of process alleging, among other things, lack of jurisdiction over their persons. (Petitioners' Appendix D(1)).

The trial court denied petitioners' motion and found that petitioners were operating, conducting, engaging in, or carrying on a business or business venture in Florida, both personally and through agents, and that respondent's cause of action arose out of a transaction or operation connected with or incidental to petitioners' business activities in the state. (Petitioners' Appendix C, paragraphs 3, 13, 14). The trial court made specific factual determinations as to the acts which constituted the doing of business in Florida, and the manner in which respondent's cause of action arose out of those activities. (Petitioners' Appendix C, paragraphs 4 through 14).

Petitioners appealed to the Third District Court of Appeal of Florida challenging the sufficiency of respondent's showing that her cause of action arose out of petitioners' business activities in the state. Specifically, petitioners argued that the activities cited by the trial court occurred after respondent's cause of action arose. (Petitioners' Appendix D(3)). Petitioners based this theory on their characterization of the nature of respondent's cause of action and the time at which they claim it arose under Florida law. Their interpretation was vigorously contested by respondent. The Third District Court of Appeal affirmed the decision of the trial court without rendering a written opinion. (Petitioners' Appendix A(1), (2)).

Petitioners then sought a writ of certiorari from the Supreme Court of Florida on the ground that the decision

of the Third District Court of Appeal conflicted with other decisions of the Florida Supreme Court and Florida's First District Court of Appeal. The Florida Supreme Court denied the petition. (Petitioners' Appendix B(1), (2)).

ARGUMENT

The petition for writ of certiorari should be denied on the grounds that: (1) there is no substantial federal question involved in this case, (2) the state appellate court resolved the case on adequate, independent non-federal grounds, (3) the decision below is not in conflict with the due process principles enunciated by this Court in *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Petitioners are asking this Court to overturn a state trial court's findings of fact and consequent application of the particular facts to a state long-arm statute.[1] The trial court in its order denying petitioners' motion to dismiss made a *factual determination* that the petitioners were doing business in Florida and that respondent's cause of action arose out of the business being done. *See: International City Bank & Trust Company v. Forest Shores, Inc.*, 340 So.2d 530 (Fla. 1st DCA 1976). Florida law dictates that each case involving the application of its long-arm statute must be resolved individually on the basis of the facts revealed by its particular record. *Wm. E. Strasser Construction Corporation v. Linn*, 97 So.2d 458 (Fla. 1957); *Babson Bros. Co. v. Allison*, 298 So.2d 450 (Fla. 1st DCA 1974); *McCarthy v. Little River Bank and Trust Company*, 224 So.2d 338 (Fla. 3d DCA 1969). This Court has indicated that it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The application of local laws and the facts on which such application is founded are questions for the state court. *Scripto v. Carson*, 362 U.S. 207 (1960).

[1]Petitioners did not at any time challenge the constitutionality of the statute involved herein. The Supreme Court of Florida had previously determined that it is constitutional. *State v. Register*, 67 So.2d 619 (Fla. 1953).

Furthermore, petitioners failed to raise a substantial federal question before the Third District Court of Appeal of Florida. Petitioners framed and limited their jurisdictional argument to maintaining that respondent "has not shown facts which, even if accepted as true, would legally satisfy the requirements of the long-arm statutes . . .". (Respondent's Appendix A). Thus, petitioners raised only a non-federal issue, that is, whether Florida's long-arm statute authorized the assertion of jurisdiction over petitioners on the particular facts presented. They did not raise any federal question as to whether the exercise of such jurisdiction, if found to be authorized, is consistent with due process of law.

The specific points of law disputed by the parties before the Third District Court of Appeal, namely the nature of respondent's cause of action and the time at which it arose, are questions of state law. *See: Garner v. Pearson*, 374 F. Supp. 580 (M.D.Fla. 1973); *Key Pharmaceuticals, Inc. v. Robinson*, 334 So.2d 137 (Fla. 3d DCA 1976). Respondent successfully demonstrated to the Third District Court of Appeal that although her claim of ownership of the property in question originally derived from her dower rights, her present cause of action is not a dower claim.

Under Florida law, the term "cause of action" consists not only of the "genesis" of a right, but also its breach or violation. *Luckie v. McCall Mfg. Co.*, 153 So.2d 311, 314 (Fla. 1st DCA 1963) *cert. denied* 157 So.2d 817 (Fla. 1963). Respondent's cause of action arose out of her demand and petitioners' refusal to honor her ownership right in the property in question, and out of petitioners' subsequent and continuing retention, control, and exercise of dominion over this property through business activities

conducted in Florida. These activities all clearly occurred after the death of Edward C. Donnelly, Jr. and while petitioners were doing business in Florida through their control of John Donnelly & Sons.

Respondent also complained of petitioners' failure, personally and through their agents (the executors of the estate of Edward C. Donnelly, Jr.) to perform certain duties owing to respondent. Under Florida law, respondent's timely election of dower made her a creditor of her late husband's estate. *See: Wax v. Wilson,* 101 So.2d 54 (Fla. 3d DCA 1958). Respondent demonstrated to the Third District Court of Appeal that petitioners, through their agents, had the duty to pay the debts of the Donnelly estate. In furtherance of this duty, petitioners and their agents investigated, certified and paid numerous debts of the estate. Respondent demanded that petitioners pay the estate's debt to her, was refused payment, and thereafter demanded proper proof of petitioners' alleged ownership rights to the property in question. Petitioners, personally and through their agents, refused to present proper independent verification of their claim and simply relied upon the trust document itself. This demand and refusal clearly occurred after the death of Edward C. Donnelly, Jr. and during the time petitioners were actively engaged in business in Florida through their agents in the investigation, certification and payment of the debts of the estate.

Thus, on the basis of state law, the trial court determined not only that petitioners were engaged in a business or business venture in Florida, but that respondent's cause of action arose out of their business or business venture. The Third District Court of Appeal affirmed the trial court's decision without finding the need to render a written opinion and the Supreme Court of Florida, by declining to accept jurisdiction, indicated that the decision was not in conflict with other expressions of Florida law.

It is significant that the Third District Court of Appeal did not render a written opinion. It is well-established that before this Court will review a decision of a state court it must affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction to review the cause, and that a decision of the federal question was necessary to its determination. Where the state court does not render a written opinion and it appears that the judgment might have rested on non-federal grounds, this Court will not take jurisdiction to review the judgment. *Durley v. Mayo,* 351 U.S. 277 (1956). Under Florida law, an appellate court need not agree with the trial court's reasoning, but rather is bound to affirm on the basis of any theory revealed by the record. *New Magnolia Baptist Church, Inc. of Branford v. Ellerker,* 353 So.2d 204 (Fla. 1st DCA 1977); *Board of County Commissioners of Metropolitan Dade County v. Lowas,* 348 So.2d 13 (Fla. 3d DCA 1977). Clearly, petitioners cannot demonstrate that the Third District Court of Appeal's *per curiam* affirmance did not rest on adequate independent non-federal grounds.[2]

[2]Petitioners themselves indicated in their brief before the Third District Court of Appeal that the appeal could be completely resolved on the basis of Florida common law, as follows:

> "This appeal can be resolved simply and correctly by applying the commonsense rule enunciated by the Florida courts that a nonresident cannot be subject to service of process under Florida's 'doing business' long-arm statutes (Sections 48.181 and 48.071) if the plaintiff's cause of action arose *before* the nonresident was operating, conducting, engaging in, or carrying on a business or business venture in the state or before it had an office or agency in the state. [Citations omitted.]" (Petitioners' Appendix D(3) paragraph 1).

The decision below does not conflict with *Hanson v. Denckla*, 357 U.S. 235 (1958) or *Shaffer v. Heitner*, 433 U.S. 186 (1977). Petitioners have cited as their grounds for federal jurisdiction that *Hanson* and *Shaffer* establish that an element in determining whether due process has been accorded is whether the plaintiff's cause of action arose out of the non-resident defendant's activities in the forum state. The trial court applied this very element and made specific findings of fact as to the manner in which respondent's cause of action arose out of petitioners' activities in the forum state.

Petitioners also contend that this Court has not determined whether due process *requires* a plaintiff's cause of action to arise from the defendants' activities in the forum state. There is clearly no need for this Court to make the determination requested by petitioners because the state trial court expressly found such a requirement under Florida law and applied it to the facts of this case. Thus, this Court would merely be rendering an advisory opinion by addressing the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent in Opposition (With Appendix) was served by mail on BLACKWELL WALKER GRAY POWERS FLICK & HOEHL, Attorneys for Petitioners, 2400 First Federal Building, One Southeast Third Avenue, Miami, Florida 33131, this third day of July 1978.

LAURENCE A. SCHROEDER

APPENDIX A

Portion of Brief of Petitioners in Third District
Court of Appeal of Florida

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

Case No. 77-431

PAUL MARK RYAN, ARTHUR T. McMANMON, JAMES M. CONNOLLY, Trustees of the EDWARD C. DONNELLY, JR, REVOCABLE TRUST dated October 8, 1968,

Appellants,

vs.

MARY ELIZABETH DONNELLY,

Appellee.

* * *

It is on these facts, and on the argument of this brief that the plaintiff has not shown facts which, even if accepted as true, would legally satisfy the requirements of the long-arm statutes, that the defendants rest their assertion that the trial court has not obtained jurisdiction over their persons.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO DISMISS AND MOTION TO QUASH PURPORTED SERVICE OF PROCESS ON THE GROUND OF LACK OF JURISDICTION OVER THE PERSONS OF THE DEFENDANTS WHERE THE COURT RELIES ON ALLEGATIONS OF DEFENDANTS' ACTIVITIES IN THE STATE OCCURRING AFTER THE PLAINTIFF'S CAUSE OF ACTION AROSE AND WHERE THE PLAINTIFF HAS NOT SHOWN THAT THE DEFENDANTS WERE DOING BUSINESS IN FLORIDA OR THAT THE DEFENDANTS' ALLEGED ACTIVITIES IN THE STATE GAVE RISE TO THE PLAINTIFF'S CAUSE OF ACTION.

* * *

Supreme Court, U. S.
FILED
JUL 31 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

NO. 77-1739

OCTOBER TERM, 1977

PAUL MARK RYAN,
ARTHUR T. MCMANMON, JAMES M. CONNOLLY
Trustees of the EDWARD C. DONNELLY, JR.
REVOCABLE TRUST,

Petitioners,

v.

MARY ELIZABETH DONNELLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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July, 1978

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QUESTION PRESENTED

The respondent, Mrs. Donnelly, has not challenged the substance of the question presented by the petitioner. She merely uses this section of her brief to argue why the Court should not consider the question presented.

In reply to her arguments:

(1) The question presented warrants review by this Court because it is a federal constitutional question dealing with a fundamental issue of jurisdiction by one state's court over another state's court on which there is a clear and express conflict between the circuit courts of appeal of the United States. See pages 12-13 of the petition.

(2) That the question presented "has already been resolved by the state trial court" is not an argument why the petition should be denied but is merely a precondition for this Court to accept jurisdiction and to review the state court's decision.

(3) The question presented in this case was decided adversely to the petitioners because the trial court and the district court of appeal totally ignored that the respondent's cause of action could not possibly have arisen out of the petitioners' alleged activities in the state. The order of the trial court shows on its face that every single act of the petitioners allegedly constituting the doing of business in Florida occurred after the death of Mr. Donnelly, the time at which Mrs. Donnelly's cause of action for dower necessarily arose.

STATEMENT OF THE CASE

The first sentence of the first paragraph of the respondent's statement of the case refers to her "*claim* of an ownership right"; the first sentence of the second paragraph of the respondent's statement of the case refers to her "ownership right." This convenient shift from a *claim* of ownership to an assertion of an established ownership right underlies the respondent's attempt to avoid the federal constitutional issue raised in this petition by redefining the cause of action for dower stated in her complaint into some other type of action that might arguably be said to have arisen after the death of Mr. Donnelly.

There can only be one purpose for such an unsupportable shift: to overcome the complete failure of the Florida courts to recognize that the respondent's cause of action for dower could not possibly have arisen out of the petitioners' alleged activities in the state. The ultimate goal is to vest the Florida rather than the Massachusetts courts with jurisdiction over this matter.

ARGUMENT

The following points are presented in response to the argument made by the respondent:

(1) Mrs. Donnelly's complaint unambiguously states that it is a claim "for a dower interest in all assets held or claimed to be held by the Trustees under the Edward C. Donnelly, Jr. Revocable Trust." See page App. 49 of the petition. The very essence of her claim is to determine whether she has any interest in the assets held in Massachusetts by Massachusetts residents because of the death of her husband. Without the death of her husband she would have no claim whatsoever.

There can be no question, therefore, that the respondent's cause of action arose out of and at the time of Mr. Donnelly's death. Florida law is clear that dower rights become vested only upon death and that all claims for dower relate back to the time of death. *In re Ginsberg's Estate*, 50 So.2d 539 (Fla. 1951); *Griley v. Griley*, 43 So.2d 350 (Fla. 1949); *Bowler v. Bowler*, 159 Fla. 447, 31 So.2d 751 (1947); *Bennett v. Bennett*, 157 Fla. 627, 26 So.2d 650 (1946); *Henderson v. Usher*, 125 Fla. 709, 170 So. 846 (1936); *Murphy v. Murphy*, 125 Fla. 885, 170 So. 868 (1939). The trial court and the district court of appeal totally ignored this in their decision to retain jurisdiction. See pages App. 1 - App. 2 and App. 8 - App. 16 of the petition.

(2) The order of the trial court refusing to dismiss the case for lack of jurisdiction over the person shows on its face that all of the activities of the petitioners allegedly constituting the doing of business in Florida occurred after the death of Mr. Donnelly. See pages 10 - 11 of the petition. It is not these findings of fact that are challenged by the present petition but, rather, the unconstitutional refusal of the court to recognize that the respondent's cause of action for dower must have arisen out of the alleged activities in the state before the court could have jurisdiction.

(3) This issue of jurisdiction was clearly raised before the Third District Court of Appeal. See pages App. 48 - App. 53 of the petition. Indeed, it was the main thrust of the petitioner's appeal to the Third District.

Furthermore, there was no way in which either the trial court or the Third District could escape ruling on the constitutional issue; it was inherent and central to the motion to dismiss and the subsequent appeal. There is no "adequate independent non-federal ground" upon which those courts could base their decision to accept jurisdiction in this case without running afoul of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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